REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. E035 OF 2021

EZEKIEL MWENDA MUNJURI.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

(Being an appeal from the original conviction and sentence of the Senior Resident Magistrate's

Court at Tigania in Criminal Case No. 38 of 2017 delivered on 7th January 2021 by

Hon. P. M. Wechuli, SRM)

JUDGMENT

1. Ezekiel Mwenda Munjuri was charged with two counts in Tigania Criminal Case No. 38 of 2017. Count I was the charge of 'Defilement Contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act'. The particulars of offence as set out in the charge dated 6th December 2017 were as follows: -

> *'On diverse dates between 12th and 14th November, 2017 at [Particulars withheld] Sub-location, Ncooro Location, in Tigania West Sub-county within Meru County, intentionally caused his penis to penetrate the vagina of AK, a child aged 13 years.'*

2. He was charged with the alternative charge of 'Committing an Indecent Act with a Child contrary to Section 11 (1) of the Sexual Offences Act.' The particulars of offence were as follows: -

> *'On diverse dates between 12th and 14th November, 2017 at [Particulars withheld] Sub-location, Ncooro Location, in Tigania West Sub-county within Meru County, intentionally touched the vagina of AK, a child aged 13 years with your penis.'*

3. For Count II, he was charged with the offence of 'Abduction with Intent to Confine Contrary to Section 259 of the Penal Code.' The particulars of offence were as follows: -

> *'On diverse dates between 12th and 14th November, 2017 at [Particularswithheld] Sub-location, Ncooro Location, in Tigania West Sub-county within Meru County, with intent to cause AKa to be secretly and wrongfully confined, abducted the said AK, a child aged 13 years.'*

4. The Appellant first pleaded guilty to both counts but upon warning of the severity of the sentence of the charges, he changed his plea and pleaded not guilty to both counts. The matter proceeded to trial and the Appellant was placed on his defence. By Judgement delivered on 7 th January 2021 by Hon P. M. Wechuli SRM, the Appellant was convicted for both Counts and was sentenced to 15 years imprisonment for Count I and 7 years imprisonment for Count II. The sentences were to run consecutively.

The Appeal

5. Being dissatisfied with both the Judgement and the Sentence meted by the trial Court, he has preferred the instant appeal. He initially filed grounds of appeal but in his submissions made amended supplementary grounds of appeal. He raises the following grounds of appeal: -

> ***i) That the Learned trial magistrate erred in both matters of law and facts by relying on the evidence of PW1 despite her telling the Court that she did not know the Appellant.***
>
> ***ii) That the Learned trial magistrate erred in both matters of law and facts by failing to note that there was contradiction in the***

evidence adduced by the prosecution witnesses.

iii) That the learned trial magistrate erred in both matters of law and facts by failing to note that there was need of identification parade since the Appellant was not known by the complainant.

iv) That the learned trial magistrate erred in both matters of law and facts by failing to note that the age assessment of the complainant was not adduced before Court.

v) That the learned trial magistrate erred in both matters of law and facts by failing to note that key witnesses were not called to support the evidence of PW1.

vi) That the learned trial magistrate erred in both matters of law and facts by failing to take into account the defence of the Appellant and his defence witnesses.

vii) That the learned trial magistrate erred in both matters of law and facts by failing to take into account the period spent in custody (pre-trial) according to Section 333 (2) of the Criminal Procedure Code.

Appellant's Submissions

6. The appeal was canvassed by way of written submissions. The Appellant filed written submissions on 1st September 2020. He submits that the Prosecution did not prove their case beyond reasonable doubt. He urges that when PW1 first took the stand, she said that she did not know the Appellant and it is then that the Prosecutor applied to stand her down and she thereafter changed her account and said that she knows the Appellant.

7. He urges that the Prosecution evidence was marred with contradictions in that PW1 said that she had been sent by her mum to the shop while her mother told the Court that she had sent PW1 for water. That PW1 said that she started screaming but later told the Court that she could not scream. That PW1 said that she had put on a skirt and yellow blouse and a red panty but that the exhibits produced by the investigation officer (a black underpant, black blouse and blue and white skirt) contradicts that of PW1. That the exhibit produced was not torn and did not have blood as alleged by PW1 and other witnesses. That PW1 contradicted herself on the distance between her home and that of the Appellant as well as how far the Appellant took her. He urges that the trial Court should not have relied on this nature of evidence. He cites the case of *John Barasa vs Republic*, Criminal Appeal No. 22 of 2005 and *Bunkrish Padya vs Republic* E-LOK (20) 1983 E.A.C.A.

8. He further urges that there was need for an identification parade because the complainant told the Court that it was her first time to see the Appellant and that the clinician who examined her testified to have been told that she was defiled by someone unknown to her. He further urges that no one visited the house where it was alleged that he had locked up the girl for 3 days. Citing the case of *Toroke vs Republic*, he urges that it is possible for a witness to believe quite genuinely that he had been attacked by someone he knows, yet be mistaken. He submits that identification evidence is defined as evidence that a defendant was or resembles a person who was present or near a place where the offence was committed, or an act connected with the offence. He urges that there is need for caution before accepting identification evidence. He cites the cases of *Charles O. Maitanyi vs Republic* and *Kariuki Njiru & 7 Others vs Republic*. He urges that in order to determine whether identification is truthful, the Court must evaluate the believability of the witness who did the identification including the witness' intelligence, capacity for observation, reasoning and memory. That the accuracy of the witness' testimony also depends on the opportunity the witness had to observe and remember that person and whether the victim knew the person before. He thus urges that there was need for an identification parade in order to prove the case beyond reasonable doubt. He relies on the case of *John Mwangi Kamau vs Republic* (2014) eKLR.

9. He further urges that the complainant's mother (and PW4) told the Court that some children who were looking after cattle came and told her (complainant's mother) that they had seen the complainant in a thicket, and that she screamed and followed them but fell at the church, but other people went to the scene and found the complainant naked. He urges that these other people should have been called as witnesses and the failure to call them casts doubt on the Prosecution's case. He cites the case of *Bukenya & Others vs Uganda* (1972) EA and *J.M.N vs Republic*, Embu Criminal Appeal No. 139, 140 and 141 of 2012.

10. He further urges that the age of the complainant was not proved and that there was no age assessment done but that at page 3 of the Judgment, the Court indicated that an age assessment was produced by PW2 the clinical officer.

11. He further urges that his Counsel appeared on his behalf until 26th July 2019 at which point he asked the Court that he wanted to be supplied with witness statements but his request was ignored. He urges that when the last witness appeared before Court, he asked the Court to be supplied with witness statements but the Prosecutor told Court that this had been done and without confirming from the Appellant whether this had been done the Court proceeded with the matter. He relies on Article 50 (2) (j) of the Constitution.

12. Citing the definition of the term 'beyond reasonable doubt' in *Philip Muiriri Ndaruga vs Republic* (2016) eKLR he urges that the prosecution failed to prove their case against him beyond reasonable doubt.

13. He also urges that the trial Court failed to take into account the pre-trial detention period in accordance with Section 333 (2) of the Criminal Procedure Code. He cites *Ahamad Abolfathi Mohammed & Another vs Republic* (2018) eKLR.

Prosecution's Submissions

14. The Prosecution filed submissions dated 16th September 2021. They start by summarizing the Prosecution's case which they urge was that the complainant aged 14 was walking when she met the Appellant who held her by her collar and neck and forcefully dragged her to his

house where he locked her for three days without food and water until the complainant got a chance and ran away. That during the period, the Appellant did defile the complainant. They urge that the key ingredients for the offence of defilement as per Section 8 (1) and 8 (3) of the Sexual Offences Act include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence. They cite the definition of abduction as per Section 256 and 259 of the Penal Code.

15. With respect to the age of the complainant, they urge that she was taken for age assessment which confirmed that she was 13 years old. That further, a P3 form filled and produced indicated that the complainant was 13 years old at the time. They cite the case of *Dominic Mwinaria vs R*, Criminal Case No 52 of 2017 (2017) eKLR, for the proposition that a P3 form is a proper method of proving a victim's age.

16. They cite Section 2 of the Sexual Offences Act, the case of *Mark Oiruri Mose vs R* (2013) eKLR and the case of *Erick Onyango Ondeng vs Republic* (2014) eKLR for the proposition that penetration need not be complete and could also be partial. They urge that there was uncontested and unimpeached evidence of the clinician, PW2, confirming that the hymen of the complainant had been freshly torn and a P3 form was also produced confirming the same. They urge that this evidence was consistent with the complainant's account of events.

17. They cite Section 124 of the Evidence Act (a proviso thereof) for the proposition that a trial Court can convict the accused person in a prosecution involving a sexual offence on the evidence of the victim alone if it believes the victim is truthful and records the reasons for that belief. They also refer to the case of *George Kioyi vs R* Criminal Appeal No. 270/2012 (Nyeri) and *Jacob Odhiambo Omumbo vs R* Criminal Appeal No. 80 of 2000 (Kisumu).

18. On identification, they urge that the complainant positively identified the Appellant as she had spent three days locked up with the Appellant at his place. This gave the complainant ample time to positively identify the complainant without a shred of doubt.

19. On whether the complainant was forcefully compelled to go to the Appellant's house, they urge that the Appellant forcefully intercepted the complainant and took her to his home. The evidence of the complainant was that the Appellant held her by her collar and neck while dragging and threatening her. The complainant was subsequently held for three days by the Appellant without food and water. They urge that these are not the actions of a voluntary engagement.

20. On sentencing, they urge that Section 8 (3) of the Sexual Offences Act provides for a minimum mandatory sentence of 20 years. They urge that the Supreme Court in ***Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)*** [2021] eKLR clarified that the ratio therein only applies to murder cases. They thus urge that the sentence that was meted out on the Appellant should be reviewed upwards. They cite Section 14 (1) of the Criminal Procedure Code and urge that the law does not provide that sentences shall be concurrent. They urge that sentences should be consecutive as shown in the excerpts but that the Court can direct that the sentences ran concurrently following the principles governing the applicability of consecutive or non-consecutive sentences. They urge that where in a trial an accused is convicted of several distinct offences and punished for each offence, such punishments, when consisting of imprisonment, are to commence one after the expiration of the other. They urge that the trial Court, having evaluated the evidence on record and considered the impact on the victim of the brutality and bestiality of the offence deemed it fit to make the appropriate order of consecutive sentence. They pray that the order of the sentences running consecutively be upheld.

21. They urge that the case was proved beyond reasonable doubt and the appeal lacks merit and they urge the Court to uphold the conviction and sentence of the trial Court.

Evidence adduced at trial Court

22. This being a first appeal, this Court is invited to look at both questions of fact and of law. The Court is enjoined to analyze the evidence and make its own independent findings bearing in mind that it is the trial Court that had the advantage of seeing the demeanour of the witnesses. See ***Okeno v Republic (1972) EA 32.*** The evidence adduced at the trial Court is reproduced hereunder as follows: -

Prosecution's Case

PW1

23. PW1 was taken through a voir dire and found competent to testify. She first testified as follows: -

> ***"I am AK. I come from Muriri. I go to [Particulars withheld] Primary School Standard 8. I do not know Ezekiel Mwenda."***

24. The Prosecution prayed to stand her down. She later on took the stand again and testified as follows: -

> ***"I am AK. I come from Muriri. I know Ezekiel Mwenda. He raped me on 12.11.2017 at 4:00 p.m. I recall I had been sent by my mum to the shops. I met the accused. I only knew him that day. I had never known him before. He started holding me. I started screaming. Nobody came. He held me by my collar. I could not scream, since he had held me by the neck. He pulled me into his house and locked me in for 3 days without food or a drink. One day he forgot to lock the door. I opened and ran out. I went to my mum and we went to the police to report. We went with my sister to the police as well. We were given a P3 form. We wrote statements at the police. I then went to Miathene hospital. HIV tests were done. Yes, when the accused grabbed me, he threatened me with a knife. He said if I make noise he would kill me. He held me at the road. No one was present. His house is quite far from the road. He was pulling me on the ground towards his house. I didn't see anyone else at his place. It is his own home that he took me. It is just one room with a bed. The house has electricity. I had put on a skirt and a yellow blouse. I had put on a red panty. I also had a biker on. I also had a pink bra on. He removed all my clothes on the first day. He had on a white trouser with a white shirt. He had on a cowboy boxer. For those 3 days, he forced me to stay in his house. He used his penis to defile me. He inserted one in my private parts. I felt bad when he did that. I was not on my menstrual cycle. He didn't follow me when I left his***

house. This is the P3 form I was given (P3 - MFI 1). We went to a public well as private hospital. I don't know why he did that. He is Mwenda, the accused in dock."

Cross examination

"Your home is not many kilometres from your road. It is like 1 km. You had on a white trouser, not a black trouser. We didn't meet anyone on the way to your house. I knew it was you since it was you who committed the offence. You kept me in your house for 3 days without food or drinks. You dint have any motor cycle or motor vehicle. It is not true that on that day you had a motorcycle. I didn't see anyone for the 3 days. There's no other house I saw. I didn't see the 5 houses you are saying. Yes, you have constructed your own house. On the day I left I didn't meet anyone. Your home is 10 km from ours. We went 5 km from your place. You held me 15 km from your home. You held me 20 km from your home. I had been sent by my mum to the market. I met you on the road. I don't know the name of the place."

PW2

25. PW2 testified as follows: -

"I am Geoffrey Muthomi, a clinician at Miathene. I have a P3 form of AK, 13 years. She said on 15.11.2017 she was caught by someone unknown to her. She was sexually assaulted. Her pants and clothes were soiled. She had PV bleeding which was fresh. Hymen was torn. She had red blood cells. Due to the bleeding and torn hymen I made a conclusion of defilement. I wish to produce the P3 form and treatment notes. I used the treatment notes to fill the P3 form."

PW3

26. PW3 testified as follows: -

"I am AKM. I come from Mwili. I know Ezekiel Mwenda. He assaulted my child on 12.11.2017 at 3:00 p.m. We had come from church with AK. I prepared maize and AK went for water. I told her that at 4:30 p.m. I would go to a chamaa. I went to chamaa and came back at 7:00 p.m. I found the girl had gone off and the maize and beans had not been cooked. I went to check at the church but people had left. I asked her Sunday Schools friends. They said they had parted. I went home she wasn't present. I searched for her all over. I didn't find her that night. At 8:00 p.m, I went to report to the AP's. The following day I went to the police. The children who were with her were locked up. When the children were beaten they said AK had gone to fetch a book. We found her on Tuesday. Children who were looking after cattle came and told me they had seen her at a thicket. I screamed and followed them. I fell at the church but after people went to the scene, they found she was naked. They hid her in the house and we went to the police. The child was swollen on the face, couldn't talk well since she kept on crying, and she couldn't walk well. She told me the accused person had grabbed her. Her top dress was torn she had to be massaged for a whole month. A jeans skirt and blouse had been torn. She said she was raped by the accused and he restrained her. I went to report at Ngundune police station. We then went to a private hospital then later to Miathene hospital. She was 13 years old at that time. I wrote my statement at the police."

PW4

27. PW4 went through a voir dire and was found competent to testify. She testified as follows: -

"I am Loina Monica. I am from Mwili. I am a salonist. I know AK. She is a neighbor. I knew the accused when he raped her. On 12.11.2017 on a Sunday I was in my salon. I saw the complainant go to church at 9:00 a.m. and come back at 3:00 p.m. I didn't see her again. At 7:30 p.m, I heard her mother looking for her. We assisted her mother to look for her. On Tuesday the complainant was seen by children looking after animals. We told her sister to talk to her. She informed her sister where she was. Her clothes were blood stained. I told them to go to police. I went with her to the police to report. I wrote my statement. AK said that the accused grabbed her and locked her in his house. He even raped her while she was in his house. I had never seen the accused before. He is in dock."

PW5

28. PW5 testified as follows: -

"I am No. xxxxxx P.C. Santa Panya of Tigania Police Station. I took over the case from Corporal Makoba who went on transfer. AK and her mother reported that the accused defiled her vide OB xxxx. Victim was escorted to hospital. A P3 form was filled and statement were recorded. The accused was arrested on 5.12.2017. Clothes were handed over to me. (Clothes - PEx 3) Pink Biker(black under pant -- P Ex 4) (blouse black - PEx 5) (Blues white skirt P Ex 6)"

Defence Case

29. The Appellant was placed on his defence. He testified as follows: -

"I am Ezekiel Mwenda Munjuri. I come from Muroro. I am a farmer. I was arrested. I was told I abducted someone at 5 p.m. How come nobody saw us for 15 kms. My home is big. I wasn't examined. I don't know complainant."

Issues for Determination

30. From the contents of the Petition of Appeal and the submissions by parties, the following issues arise for determination: -

> ***i) Whether the Prosecution proved their case beyond reasonable doubt.***
>
> ***ii) Whether there is reason to disturb the sentence meted out by the trial Court.***
>
> ***Determination***
>
> ***i) Whether the Prosecution proved their case beyond reasonable doubt.***
>
> ***Count I: Defilement Contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act***
>
> ***Age of the Complainant at the time of Offence***

31. Concerning the complainant's age, the Court observes that the P3 form on record indicates that she was 13 years at the date of examination. Her mother, PW3 also testified that she was 13 years old.

32. During hearing, the Court ordered for an age assessment to be done and this Court has observed that there is a note from the Medical Superintendent, Miathene Sub-County Hospital to confirm that the complainant was examined and found to be 15 years old as at 10th August 2018. This Court thus finds that this note was the age assessment report. The Court finds so, because the record of proceedings for 10th August 2018 show that the Prosecution indicated to the Court that they had an age assessment report. It is therefore not true that an age assessment report was not availed as urged by the Appellant. In any event, the Court finds that proof of age is not confined to production of a birth certificate or age assessment report. A P3 form can also be sued to prove the age of a complainant. See ***Musa Kipsiele Chepkonga vs Republic*** [2021] eKLR. See also ***Fappyton Ngui Mutuku vs Republic*** *[2012] eKLR.*

33. The Court thus considers that if the complainant was 15 years old as at August 2018, this means that in November 2017, she was about 13 years old. A person of 13 years old falls under the definition of a child, both under the Sexual Offences Act and the Children's Act as discussed above.

Act of Penetration by the Accused

Identification

34. On the matter of identification of the Appellant, this Court observes that during hearing at the trial Court, the complainant was able to identify the Appellant as the assailant. She testified to have been grabbed by the Appellant while on her way to the shops and taken to his house where she was locked for 3 days without food or water. The Court considers that while in the house, the complainant had ample time to see the Appellant and she could thus, not be mistaken as to his identity. She was also able to identify the house where she was locked and she testified as follows: -

> ***"His house is quite far from the road. He was pulling me on the ground towards his house. I didn't see anyone else at his place. It is his own home that he took me. It is just one room with a bed. The house has electricity."***

35. This Court thus finds that the complainant's identification of the Appellant as her assailant was positive.

36. The Court has taken note of the Appellant's assertion that when the complainant first testified, she testified that she did not know the Appellant. The Court has considered the complainant's evidence as a whole. She testified that the date the Appellant grabbed her was the first time she ever met him. The Court does not, therefore, find anything amiss in the fact that she had first said that she doesn't know the Appellant as this simply implied that prior to the incident, he was not a familiar face.

Penetration

37. On the matter of penetration, this Court observes that the complainant testified to have been defiled. She testified that the Appellant used his penis to defile her. She testified as follows: -

> ***"He used his penis to defile me. He inserted one in my private parts. I felt bad when he did that. I was not on my menstrual cycle."***

38. The above depicts a girl who was well aware of the nature of sexual activity. She testified that she was not in her menstrual cycle and this shows that she understands the nature and functioning of genital organs. Although the Court did not have a chance to observe her demeanour, the Court finds that the complainant was intelligent and understood the act of sexual penetration.

39. The Court also finds the complainant's evidence truthful as it was corroborated by that of PW3 and PW4. The complainant testified that the Appellant grabbed her and took her to his house at about 4:00 p.m on the material date. PW3 testified that on the material date, they had come from church and got home at about 3:00 p.m. That she then sent the complainant for water and later on left for chama but when she returned, she did not find the complainant at home. PW4 also testified to have last seen the complainant at home at 3:00 p.m when they had

returned form church.

40. Furthermore, the clinical officer, PW2 testified that from the examination done on the complainant, a conclusion was made that there was defilement. He testified as follows: -

> ***"She was sexually assaulted. Her pants and clothes were soiled. She had PV bleeding which was fresh. Hymen was torn. She had red blood cells. Due to the bleeding and torn hymen I made a conclusion of defilement."***

41. The above confirms that the complainant was penetrated. This was corroborated by the evidence of her mother, PW3 who confirmed that when she saw the complainant after the 3 days, she was crying and she could not walk properly.

42. The Appellant has urged that there was contradiction in the exhibits with respect to the colours and the type of clothes. This Court does not find this contradiction material enough to outweigh the medical evidence of defilement and the complainant's evidence that it is the Appellant who defiled her.

43. The Appellant also urges that key witnesses, being the children who reported to the complainant's mother that they had seen the complainant in a thicket were not called as witnesses. The Court is aware of the decision in *Bukenya vs Uganda* (1972) EA which the Appellant has relied on. The Court, however, considers that the said children were only going to testify that they saw the complainant at a thicket, which is the same place PW5 testified to have seen the complainant after the children came to report that they had seen her.

44. Further, this Court finds that it is not for an accused person to determine which witnesses the Prosecution should have called. That is the sole prerogative of the Prosecution upon consideration of the evidence supplied by the investigating officers. Further, Section 143 of Evidence Act (Cap 80) Laws of Kenya provides as follows: -

143. Number of Witnesses

> ***No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.***

45. This issue was also discussed by the High Court in the Court of Appeal case of ***Keter v Republic [2007] 1 EA 135*** where Bosire, Githinji and Onyango-Otieno JJA held as follows: -

> ***"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."***

46. In the instant case, having found that the evidence of PW1, the complainant, corroborated by the expert evidence of PW2, the clinical officer and that of PW3 an PW4 was sufficient to prove beyond reasonable doubt that the Appellant committed the offence of defilement, this Court does not agree that it was necessary to have the children testify.

47. Another key issue that the Appellant raised was that he was not supplied with witness statements. It is true that it is required of the Prosecution to supply an accused person with all the evidence they intend to rely on. This is the hallmark of a right to a fair trial. This Court has looked at the record and observed that indeed, the Appellant, on 22nd October 2019 requested to be supplied with statements. The Court then ordered for him to be supplied with the statements. On the next mention date on 6th November 2011, the Appellant who was present did not complain of not having been supplied with statements. On the next mention date on 30th December 2019, he also did not complain of not having been supplied with statements. This was the case on 15th January 2020 and on 26th February 2020. The next time the Appellant complained of not having statements was on 9th March 2020.

48. From the record, on the said date, the Prosecution confirmed that they had supplied the Appellant with the statements. The Appellant did not object to this representation. From the record, this Court finds that the statements were indeed availed to the Appellant and this explains his failure to protest during a number of mentions when he was present in Court. This Court is convinced that when the Prosecution represented to the Court that statements had been availed to the Appellant, if at all he had not been supplied with them, he would have indicated to the Court as much. Indeed, this was the only way of confirming the position. The Court also considers that at the point the Appellant complained of not having the statements, majority of the witnesses had already testified and it was only PW5, the investigating officer who was yet to testify.

49. This Court ultimately finds that all the essential ingredients of the offence of defilement were proven beyond reasonable doubt and the Court upholds the conviction of the trial Court

Count II: Abduction with Intent to Confine Contrary to Section 259 of the Penal Code.

50. Section 259 of the Penal Code provides as follows: -

> ***259. Kidnapping or abducting with intent to confine***
>
> ***Any person who kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined is guilty of a felony and is liable to imprisonment for seven years.***

51. Section 256 defines the meaning of abduction as follows: -

> ***256. Definition of Abduction***
>
> ***Any person who by force compels, or by any deceitful means induces, any person to go from any place is said to abduct that person.***

52. The Court has already analyzed how the complainant came to be at the Appellant's house for 3 days. She was grabbed by the collar and dragged to the house. To use her own words, the Court reproduces her evidence as follows: -

> ***"He started holding me. I started screaming. Nobody came. He held me by my collar. I could not scream, since he had held me by the neck. He pulled me into his house and locked me in for 3 days without food or a drink. One day he forgot to lock the door. I opened and ran out. I went to my mum and we went to the police to report. We went with my sister to the police as well. We were given a P3 form. We wrote statements at the police. I then went to Miathene hospital. HIV tests were done. Yes, when the accused grabbed me, he threatened me with a knife. He said if I make noise he would kill me. He held me at the road. No one was present. His house is quite far from the road. He was pulling me on the ground towards his house."***

53. The above is indicative of use of force to get the complainant into his house. From the complainant's ability to describe the house where she was held, the Court is satisfied that the complainant was confined in a house for 3 days together with the Appellant. She testified that on one day when the Appellant had forgot to lock the door, she took the opportunity and ran away.

54. The Court thus finds that the elements of abduction were proven and the Prosecution, thus proved beyond reasonable doubt that the Appellant was guilty for the offence of abduction.

ii) Whether or not there is reason to disturb the sentence meted out by the trial Court.

55. The leading authority on the question of interfering with sentence is that of ***Wanjama v Republic Criminal Appeal No. 204 of 1970 (1971) EALR 493, 494,,*** where Trevelyan J held as follows:-

> ***'An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.'***

56. For Count I, the Appellant was sentenced to 15 years imprisonment which in this Court's view was lenient because the penalty section for the offence of defilement under Section 8 (3) of the Sexual Offences Act provides for a minimum of 20 years imprisonment. The trial Court must have *taken into account* the period that the Appellant was in pre-trial detention in arriving at this sentence. This Court further observes that the Appellant was out on bond until 5th January 2019 when he begun to serve time for a different offence.

57. For Count II, he was sentenced to 7 years imprisonment which this Court finds was within the law.

58. The Court ordered that the sentences would run consecutively, which the Prosecution urges was the correct thing to do as per 14 (1) of the Criminal Procedure Code. This Court observes that both offences are based on a series of one transaction. The offence of abduction occurred at the same time, and in the same circumstances that offence of defilement occurred. This Court considers that when an accused is charged with more than one offence based on a series of the same transaction, the practice is for the Court to adopt concurrent sentences, unless there are exceptional circumstances calling for imposition of consecutive sentences. In the High Court case of ***Ng'ang'a vs Republic, Criminal Appeal No. 882 of 1975 (1981) KLR 530, 531,,*** Trevelyan J & Sachdeva Ag J held as follows: -

> ***'Concurrent sentences should have been awarded for this one criminal transaction.'***

59. A similar finding was made in the other High Court case of ***Ondiek vs Republic, Criminal Appeal No. 34 of 1975 (1981) KLR, 431, 444,*** where Simpson & Kneller JJ held as follows: -

> ***'The practice is that where someone commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences: Republic v Sawedi Mukasa s/o Abdulla Aligwansa (1946) 13 EACA 97 (CA-K).'***

60. In the trial Court, the Court did not express any reasons for imposing consecutive sentences. This Court appreciates the seriousness of the charges that the Appellant is faced with. The Court considers that the trial Court ought to have given reasons to depart from the practice of imposing concurrent sentences.

61. This Court will therefore order that the sentences imposed will run concurrently.

Conclusion

62. The complainant, a young girl of 14 years had been sent to the shops by her mother on the afternoon of 12th November 2017. While on her way, she was intercepted by the Appellant who grabbed her by her neck and forcefully dragged her to his house. He locked her in his house for 3 days, without food and water. The Court has observed that during hearing, the complainant was able to adequately describe the

house she was locked in for the 3 days. Her disappearance for these 3 days was confirmed by her mother, PW3 and a neighbour, PW4. It cannot be true that the child was mistaken as to the identity of the Appellant because they spent 3 days in the house together. The complainant testified that the house had electricity and this Court considers that the lighting was conducive for clear vision. The Court finds that the complainant thus had ample opportunity to identify her assailant and her identification of the Appellant was, therefore, positive.

63. She also testified to have been defiled by the Appellant for the 3 days that she was in the house. She was able to explain how the act of defilement happened. The unchallenged expert evidence of the clinical officer who examined the child as corroborated by the contents of the P3 form confirm that the child had PV bleeding and a torn hymen. This Court thus finds that the Prosecution proved penetration.

64. This Court finds that a weighing of the evidence adduced by the Prosecution and the Defence as a whole establishes all the elements of the offence of defilement beyond reasonable doubt, and the charge of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act against the Appellant was indeed proven.

65. As the complainant was forcefully intercepted while on her way to the shops and locked in the Appellant's house for 3 days, this Court also finds that the charge of Abduction with intent to confine contrary to Section 259 of the Penal Code against the Appellant was similarly proven beyond reasonable doubt.

66. As to sentencing, the Court considers that the offences were committed based on a series of the same transaction, and in accordance with the principle in ***Ng'ang'a vs Republic, Criminal Appeal No. 882 of 1975 (1981) KLR 530, 531,*** and ***Ondiek vs Republic, Criminal Appeal No. 34 of 1975 (1981) KLR, 431, 444,*** the Court will order that the sentences are to run concurrently.

ORDERS

67. Accordingly, the Court makes the following orders: -

i) The Appellant's Appeal on conviction is declined and the finding of the lower Court on conviction is upheld.

ii) The Appellant's Appeal on sentence is allowed to the extent that the fifteen (15) years and seven (7) years imprisonment terms imposed for Count I and Count II respectively will run concurrently and not consecutively as was ordered by the trial Court.

iii) The said sentences shall commence on the date of the sentence on 7th January 2021 as the Court had taken into account the period of pre-trial detention in arriving at the said sentences.

Order accordingly

DATED AND DELIVERED THIS 4TH DAY OF NOVEMBER 2021.

EDWARD M. MURIITHI

JUDGE

Ezekiel Mwenda Munjuri, the Appellant in person.

Ms Nandwa, Prosecution Counsel for the Respondent.